Cooperativa de Credito y Ahorro Vegabajena *and* Sindicato Puertorriqueno de Trabajadores, a/w United Food & Commercial Workers International Union, AFL-CIO. Cases 24-CA-4353 and 24-CA-4335

May 27, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On May 29, 1981, Administrative Law Judge James L. Rose issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[2]

1. The Administrative Law Judge found that union negotiators Oliveras and Melendez were not managerial employees. Based on these findings, he rejected Respondent's contention that the purpose of the employees' strike was to force Respondent to negotiate with managerial employees and, thus, that the strike constituted unprotected activity. Respondent excepts to the findings with regard to Oliveras and Melendez, *inter alia*, on the ground that these employees assertedly acquired managerial status upon their election to Respondent's assembly of delegates. In so doing, it contends, relying on *N.L.R.B.* v. *Bell Aerospace Company, Div. of Textron, Inc.*, 416 U.S. 267 (1974), and *N.L.R.B.* v. *Yeshiva University*, 444 U.S. 672 (1980), that the delegates "formulate or effectuate management policies by expressing or making operative" Respondent's decisions. We find no merit in this exception.

Respondent's bylaws provide that responsibility for general management and administration of the Cooperativa shall rest with the board of directors. The directors serve 3-year staggered terms. Four directors are elected directly from four geographical districts, and the remaining five are elected by the assembly of delegates.

The assembly is comprised of 50 voting delegates and 50 alternate delegates, all of whom are elected by the 5,000 shareholders. In addition to electing one or two directors each year, and electing the committee of credit and the committee of supervision, the assembly receives annual reports from the board of directors, the committee of credit, and the committee of supervision. It may remove any of the assembly-elected directors for misconduct based on a "request for dismissal" signed by 25 percent of the voting delegates. It also may review suspensions or discharges of employees at the request of the committee of supervision or the affected employee. Finally, it may be called into special session by the board of directors, the committee of supervision, or by 10 percent of the shareholders.

So far as the present record indicates, the assembly has engaged in no activities beyond receiving reports and electing directors at any time material herein.[3] The record reveals, on the other hand, that the board of directors has been involved in day-to-day management of the Cooperativa, including labor relations matters.

Based on both the official structural division of responsibility as well as the actual activities of the board and the assembly, we find that the assembly's participation in the affairs of the Cooperativa is rare and insignificant. In contrast, the *Bell Aerospace* buyers found to be managerial employees could commit their employer's credit up to $5,000 without seeking higher approval, while the faculty members found to be managerial employees in *Yeshiva University* had absolute authority over academic policy, essentially determined all faculty personnel matters, made effective recommendations regarding most of their own conditions of employment, and, in parts of the university, made final decisions regarding many student and administrative affairs. Thus, it is clear that the assembly of dele-

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

The Administrative Law Judge erroneously found that Respondent's president, Correa, testified at the hearing. This inadvertent error does not affect our decision herein.

[2] We find that it will effectuate the purposes of the Act to require Respondent to expunge from the personnel records, or other files, of Luz S. Berrios, Georgina Gomez, Gil Colon Maldonado, Francisco J. Marrero, Juan F. Melendez, Luis S. Oliveras, Gertrudis Ramos, Maria E. Renia, Juan U. Lozadd Rivera, Milagros Santa, and Lydia E. Sierra, any reference to their unlawful discharges.

We agree with the Administrative Law Judge's finding that a broad cease-and-desist order is appropriate here under the standards set forth in *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979). In so doing, however, we rely solely on Respondent's unlawful conduct subsequent to June 11, 1980.

We leave to the compliance stage of this proceeding the determination of the effect, if any, of a letter from striker Marrero to Respondent, dated August 11, 1980.

Member Jenkins would provide interest on the backpay award in accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146, 148 (1980).

[3] Oliveras and other strikers unsuccessfully attempted to obtain sufficient signatures to call a special session of the assembly to discuss the negotiations between Respondent and the Union.

gates' minimal level of participation in management does not rise to the ability to "formulate or effectuate management policies by expressing or making operative" Respondent's decisions. Finally, the fact that Oliveras and Melendez are but 2 of 50 voting delegates in the assembly further detracts from a finding that they possess managerial authority. For these reasons, in addition to those relied on by the Administrative Law Judge, we conclude that Oliveras and Melendez are not managerial employees and that there was no unprotected purpose in the employees' striking in an attempt to persuade Respondent to negotiate with Oliveras and Melendez.[4]

2. The Administrative Law Judge found that Respondent violated Section 8(a)(3) and (1) of the Act by discharging the strikers. We agree for the following reasons.

The strike began on June 11, 1980. Respondent discharged two strikers, Santa and Ramos, on June 12 and a third, Marrero, on June 18. Respondent's president, Correa, sent a letter on June 18 to all remaining strikers warning that they would be replaced if they did not return to work on June 23. None returned and Respondent discharged the remaining seven of the original strikers on June 23. No replacements were hired until July 24, 1980. Respondent's discharge of Marrero and its subsequent refusal to reinstate him became a major issue of contention between the strikers and Respondent beginning in mid-July.

Whether the strike was an economic strike or an unfair labor practice strike at its inception, we find it was an unfair labor practice strike as of Marrero's discharge on June 18, since it is clear from the record that Marrero's discharge prolonged the strike,[5] and that Respondent's discharge of the remaining seven strikers on June 23 violated Section 8(a)(3) and (1). *Towne Chevrolet*, 230 NLRB 479, 488 (1977) (discharge of Macklin).[6] In any event, it is well established that an employer lawfully may replace economic strikers, but that it violates the Act by discharging them prior to replacement. *N.L.R.B.* v. *International Van Lines*, 409 U.S. 48 (1972). Thus, even assuming, *arguendo*, the strike was an economic strike at its inception, Respondent's discharge of all the strikers violated Section 8(a)(3) and (1), since all were terminated prior to being replaced.[7]

3. Respondent excepts to the backpay portion of the Administrative Law Judge's recommended remedy and Order. It contends that, through a July 14, 1980, tentative settlement agreement with the Union, it unconditionally offered reinstatement to all strikers except Marrero and, therefore, that backpay should be tolled for those who refused its offer. We find no merit in this exception.

On or about July 14, Respondent and the Union reached a tentative settlement agreement. The agreement provided that all employees except Marrero and Berrios would be reinstated; that Marrero would resign and be paid $1,200; that Berrios' status would be decided by Respondent at a later date; that the parties would attempt to withdraw all outstanding lawsuits; that the bargaining unit would be clarified as requested by Respondent; that collective bargaining would be resumed; and that any wage increase agreed upon during negotiations would be at least partially retroactive. The striking employees initially rejected the tentative settlement agreement because Marrero refused to resign. By a July 16 union letter, however, all strikers unconditionally requested reinstatement. In addition, in a July 23 letter, the Union notified Respondent that nothing stood in the way of the reinstatement of eight named strikers, and requested further discussions regarding Marrero and the other remaining striker. President Correa, by letter of July 24, responded that, since the tentative settlement agreement had been rejected, all employees would be replaced.

Contrary to Respondent's contentions, it is clear from these facts that the tentative settlement agreement was anything but an unconditional offer of reinstatement to all strikers except Marrero. By its

[4] The Administrative Law Judge, in concluding that Oliveras was not a managerial employee, noted that, while his job was to contact delinquent borrowers and attempt to collect on their accounts, Oliveras had very little discretion about how this work was accomplished in that he was supervised by Respondent's administrator and any adjustments he arranged had to be specifically approved. The Administrative Law Judge also noted that, unlike the conceded managerial employees, Oliveras was paid on an hourly basis and punched a timeclock. In addition, he noted that Oliveras was not listed as an administrative/managerial employee in Correa's March 1, 1980, letter to the supervisory committee. Finally, the Administrative Law Judge rejected Respondent's contention that Oliveras' and Melendez' participation in the negotiations constituted a conflict of interest because of their status as delegates to the assembly. He found that their level of participation in management was insufficient to establish that they could not give their undivided allegiance to protecting the rights of employees.

[5] We find it unnecessary to pass on the Administrative Law Judge's reliance on Respondent's prestrike conduct in finding an unfair labor practice strike.

[6] In view of our finding that the strike was an unfair labor practice strike by June 18, we agree with the Administrative Law Judge's finding that Respondent, through Correa's letter of June 18, violated Sec. 8(a)(1) by threatening to replace unfair labor practice strikers.

[7] The complaint alleges that Respondent discharged Georgina Gomez on October 21, 1980, in violation of Sec. 8(a)(3) and (1) of the Act. Although the Administrative Law Judge did not make any findings with regard to Gomez' discharge, he included her in the reinstatement and make-whole provisions of his recommended remedy and Order.

The record reveals that Gomez was hired as a strike replacement in July 1980, that she joined the strike in October 1980, and that she was discharged on or about October 21, 1980. Respondent admitted in its answer, and its counsel stated on the record, that Gomez was terminated for joining the strike. We find, therefore, that Respondent violated Sec. 8(a)(3) and (1) by discharging Gomez for engaging in an unfair labor practice strike.

nature as a "package deal" the agreement conditions reinstatement on the employees' accepting the other terms of the tentative settlement. The conditional nature of the reinstatement offer contained in the tentative settlement agreement is also revealed in Respondent's refusal of the strikers' July 16 unconditional offer to return to work on the ground that they had rejected the tentative settlement agreement. Since Respondent failed to offer unconditional reinstatement to the discharged strikers, there is no basis for tolling their backpay. See *Thor Power Tool Co.*, 148 NLRB 1379, 1390 (1964).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Cooperativa de Credito y Ahorro Vegabajena, Vega Baja, Puerto Rico, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 2(b) and reletter the following paragraphs accordingly:

"(b) Expunge from the personnel records, or other files, of Luz S. Berrios, Georgina Gomez, Gil Colon Maldonado, Francisco J. Marrero, Juan F. Melendez, Luis S. Oliveras, Gertrudis Ramos, Maria E. Renia, Juan U. Lozada Rivera, Milagros Santa, and Lydia E. Sierra any reference to their unlawful discharges."

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discharge or otherwise discriminate against our employees because they engage in a lawful strike or other concerted activity for their mutual aid or protection.

WE WILL NOT threaten employees with discharge or other discrimination because they engage in a lawful strike or other concerted activity for their mutual aid or protection.

WE WILL NOT condition reinstatement of strikers on their abandoning a lawful strike.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed by Section 7 of the Act.

WE WILL offer immediate and full reinstatement to Francisco J. Marrero, Juan F. Melendez, Luz S. Berrios, Lydia E. Sierra, Luis S. Oliveras, Gil Colon Maldonado, Juan U. Lozada Rivera, Maria E. Renia, Milagros Santa, Gertrudis Ramos, and Georgina Gomez to their former jobs or, if those jobs no longer exist, to substantially equivalent positions of employment and WE WILL make them whole for any losses they may have suffered as a result of the discrimination against them with interest.

WE WILL expunge from the personnel records, or other files, of the above-named employees any reference to their unlawful discharges.

COOPERATIVA DE CREDITO Y AHORRO VEGABAJENA

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge: This matter was heard before me on various dates from December 15, 1980, through January 22, 1981. The principal allegation of the General Counsel's complaint is that a group of striking employees of the Respondent were discharged in violation of Section 8(a)(3) of the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.*

The Respondent, while conceding that the strikers were discharged "because of their strike activities," contends that it was justified in doing so because the strike was unprotected since two employee negotiators were also members of the Respondent's assembly of delegates, and one, Luis Oliveras, was also a managerial employee.

The Respondent further contends that Francisco Marrero was discharged specifically for picket line misconduct and that Luz Berrios was discharged because she had unlawfully withdrawn $1,000 from the account of one of the Respondent's members.

Additional defenses in denial or mitigation of backpay liability to the discharged strikers are similar and related to these contentions.

Upon the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. THE FACTS

A. *The Business of the Respondent*

Cooperativa de Credito y Ahorro Vegabajena (herein the Respondent or the Cooperative) is essentially a credit union organized and doing business under the laws of the Commonwealth of Puerto Rico, engaged in providing savings, loans, and related services to members.[1] Apparently the only requirement for membership in the Respondent is to make a minimum deposit of $5.

The principal manager of the Respondent is an administrator who is in charge of all hiring and firing of employees and who himself is hired by and reports to the board of directors. The board of directors is composed of nine individuals each of whom is elected for a 3-year term, the terms being staggered. Four members of the board of directors are elected one each from four geographical districts and the remaining five members are elected at large by the assembly of delegates. Each member of the assembly of delegates is elected by Cooperative members in that individual's respective district. There are approximately 100 assembly delegates. While the delegates to the assembly serve for 1 year, apparently their principal function is to meet shortly after their election in December and elect the at-large members to the board of directors. They also elect the supervisory committee and the loan committee and the assembly is a final appellate tribunal.

Though not required, all of the Respondent's employees involved in this matter were also cooperative members; and as indicated, Oliveras, Juan F. Melendez, and Juan U. Lozada were, during the material time here, elected to the assembly of delegates.

B. *The Negotiations*

In 1979, Sindicato Puertorriqueno de Trabajadores, a/w United Food & Commercial Workers International Union, AFL-CIO (herein the Union), began an organizational campaign among the Respondent's employees. There was a Board-conducted election following which, on August 2, 1979, the Union was certified as the exclusive collective-bargaining representative in an appropriate unit.[2]

In October, representatives of the parties began meeting periodically to negotiate the terms of a collective-bargaining agreement and during the next 3 months many of the noneconomic terms were agreed to, at least tentatively.

Then on January 22, 1980,[3] for the first time, attorney Lino Padron appeared as the chief spokesman for the Respondent. Although there is some dispute concerning precisely what Padron said at this first meeting, or how long it took him to do so, it is generally agreed that Padron had in mind beginning negotiations from scratch or at least substantially changing the language of those clauses the parties had already agreed to. It appears that the parties thereafter met about weekly until early June but were unable to finalize a contract, though, according to the General Counsel's witnesses, agreement was finally reached on the noneconomic items.

At a meeting on or about May 29, Padron announced that he was going to file a unit clarification petition with the Board inasmuch as it was in his opinion that Oliveras, a loan collector, was a managerial employee and should not be serving on the Union's bargaining committee. The petition was in fact filed and the parties met informally at the Board's Regional Office on June 9.

The parties had scheduled negotiation sessions for June 10 and 12 but Padron, on June 9, suggested that these meetings be postponed until the unit clarification matter could be resolved. Padron testified that what he had in mind was that the bargaining be held in abeyance until there could be a "hearing" on the unit clarification petition. Whichever, at the Respondent's insistence the scheduled meetings of June 10 and 12 did not take place.

C. *The Strike*

Following discussion among the employees on June 10, they determined to go on strike although such action was recommended against by the Union's attorney and the principal nonemployee union official.

Thus on June 11, all the employees in the above-described bargaining unit went on strike and on June 18 the Respondent sent letters to all the permanent employees stating in material part:

> We are hereby inviting you to return to work and if you fail to come to work on Monday, June 23, you will be substituted in your position as an employee until the substitute resigns or until a new similar position which is available exist.

This letter was signed by William Correa, president of the board of directors, who testified that by such language the Respondent discharged these employees. He further testified that no "substitute" employees were in fact hired by the Respondent until beginning June 24.

The temporary employees who were working on specific contracts of employment for 30 days, or more, were discharged by letter dated June 12 signed by Gregorio Rivera Martinez, the administrator, because of "your failure to comply with the first clause of the temporary work contract that you signed with the Cooperativa." The letter went on to explain that the contract committed the employee to work certain specific hours each day and since the employee did not report to work such was considered to be a breach of the employment contract.

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[1] The Respondent admits and I find that it annually receives savings deposits from, and makes loans to, members valued in excess of $500,000; and annually purchases and receives goods and supplies directly from points outside the Commonwealth of Puerto Rico valued in excess of $50,000. It is therefore an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act.

[2] The unit is:

> All tellers, secretaries, accounting clerks, loan office clerical employees and loan collectors employed by the Employer at its Cooperativa de Credito y Ahorro Vegabajena located at Calle Betances in front of Plaza del Mercado, Vega Baja, P.R., but *excluding* all other employees, professional employees, the administrator, managerial personnel, guards and supervisors as defined in the Act.

[3] All dates hereafter are in 1980 unless otherwise indicated.

The permanent employees received a second letter on June 23 stating in pertinent part that when they were invited to return to work they were "told that if you failed to return you would be subject to being substituted in your employment. Your failure to report to work this morning makes us believe that you have preferred to be replaced and, of course, you are being informed that you are dismissed and we have appointed a substitute."

The Respondent did not in fact begin hiring replacements until the next day, June 24. Thus all of the Respondent employees were in fact discharged before being replaced.

The Respondent does not contest that all of the striking employees were discharged because they had engaged in a strike, and I find they were.

In July the parties reached a tentative agreement to settle the strike, the essence of which was that all of the employees would return to work, except Marrero, who the Respondent refused to take back, and Berrios, who was not to be taken back until the allegations concerning her were cleared. Marrero was to receive payment of $1,200 and waive reinstatement. However, this settlement agreement fell through and the employees continued on their strike.

II. CONTENTIONS OF THE PARTIES

As indicated, the General Counsel alleges that the discharges of striking employees were violative of Section 8(a)(3) of the Act. The General Counsel also contends that the strike was caused, in part at least, by the Respondent's unfair labor practice of refusing to bargain in good faith with the Union.[4]

The Respondent contends that the employees were engaged in unprotected activity in that the purpose of the strike was to force the Respondent to negotiate with the employees' bargaining committee, which included two elected delegates—Oliveras and Melendez. The Respondent contends that their position as an elected assembly delegate was so closely aligned with management of the Cooperative that it was inappropriate for them to serve on the bargaining committee; and, therefore, to force the Respondent to negotiate with them was tantamount to forcing the Respondent to commit an unfair labor practice. The Respondent argues in addition that Oliveras was a member of management.

Finally, the Respondent contends that the strike was prolonged after July 23 by the fact that the employees insisted on the Respondent reinstating Marrero who had been discharged for picket line misconduct and thus, even if the Respondent's discharge of the strikers was unlawful, on July 23 the employees forfeited their right to reinstatement and backpay.

[4] Though such an allegation appears in the complaint, the Respondent settled that portion of the case, agreeing to recognize and bargain with the Union and the General Counsel does not seek a remedial bargaining order.

III. ANALYSIS AND CONCLUDING FINDINGS

A. *The Discharges*

Without question, employees have a right to strike and to discharge them for doing so is a violation of Section 8(a)(1) and (3) of the Act. Further, they are entitled to reinstatement and backpay from the date of their discharges. *Abilities and Goodwill, Inc.*, 241 NLRB 27 (1979). Thus, whether the strike here was economic or caused by the Respondent's unfair labor practices has no effect on the remedy. Nevertheless, I do conclude that it was an unfair labor practice strike.

The Respondent's bargaining posture after Padron made his appearance was one of avoiding its statutory obligation. He withdrew the Respondent's previous agreements and they met sporadically for 5 months, the parties finally reaching tentative agreement on the noneconomic items.

Then Padron filed a unit clarification petition relating to the status of Oliveras and sought to delay further bargaining until that matter could be resolved—conceivably months. In addition to concluding that Oliveras was not a managerial employee, nor even considered one by the Respondent, *infra*, I believe this tactic was an additional attempt to frustrate bargaining.

After filing of the UC petition, Padron instructed the administrator to hire someone and assign him to be supervised by Oliveras so they could factually support his contention that Oliveras was a supervisor. To this end, a temporary employee was hired on June 10. However, Oliveras never did supervise that employee, inasmuch as on June 11 Oliveras went on strike. While the Respondent does not now contend that Oliveras was a supervisor within the meaning of Section 2(11), this attempt to create facts in support of its predetermined position to exclude Oliveras from the bargaining unit, and thus from the negotiating committee, shows that the Respondent's contentions concerning Oliveras were disingenuous.

In addition to his bargaining tactics, Padron wrote the Union on April 12, stating in material part, "until the agreement is signed we do not recognize your representative authority for any union matters . . . ."

B. *The Respondent's Defenses*

1. Luis Oliveras, Juan F. Melendez, and Juan U. Lozada

Oliveras has been an employee of the Respondent for some time and was one of the leading activists on behalf of the Union's organizational campaign. It appears that Oliveras' job as a loan collector was specifically included in the bargaining unit. Beyond that, his undisputed testimony is that he earned $3.10 an hour, the minimum wage, and punched the timeclock as did other employees. While his job was to contact delinquent debtors attempting to collect accounts and set up payment schedules, he really had very little discretion with regard to how this was done. He was supervised directly by the administrator and any adjustments he made had to be specifically approved.

On the other hand the true managerial employees, the administrator and the assistant administrator, for instance, were paid on a salaried basis, do not have to punch the timeclock, and in fact did have responsible authority to make decisions. And in a memorandum to the supervisory committee of March 1, Correa listed the "Administrative Employees," and stated, "The remainder of the employees shall be classified as nonmanagerial employees of same." Oliveras was not listed as an "administrative employee."

In any event, I conclude, from the essentially undisputed facts concerning Oliveras' duties, that he was not in fact so closely aligned with management that he was appropriately included in the bargaining unit.

The Respondent's other argument is that notwithstanding, for Oliveras and Melendez to serve on the Union's negotiating committee was some kind of a conflict of interest because they were members of the Respondent's assembly of delegates, which oversees management of the Respondent by electing some of the board of directors, and the supervisory and loan committees.

In various fact settings, the Board has held that the participation of a union official on both sides of the bargaining table amounts to an impermissible conflict of interest. However, for such to be violative of the Act, or as argued here, to justify the refusal of the employer to bargain with the union, there must be sufficient participation in the employer's business that the individual could not approach negotiations with the single-minded purpose of protecting the interests of employees. Therefore, the mere fact that the union agents participate in broad managerial decisions is not sufficient to create such a conflict. For instance, a union may appoint one-half of the trustees of a health and welfare fund and still represent the employees of the fund. See, e.g., *Child Day Care Center, Verona, Virginia and Baltimore Regional Joint Board, Amalgamated Clothing and Textile Workers Union Health and Welfare Fund*, 252 NLRB 1177 (1980).

Thus, the participation of Oliveras, Melendez, and Lozada (a bargaining unit member but not on the negotiating committee) in management of the Respondent was clearly insufficient to establish that they and the Union could not give their undivided allegiance to protecting the rights of employees. I therefore conclude that the fact that Oliveras and Melendez were delegates did not foreclose their being on the negotiating committee. There was therefore no unprotected purpose in striking to force the Respondent to bargain with the employees' designated agents.

2. Francisco J. Marrero

On June 18 the Respondent discharged Marrero contending that he had used threatening, improper, and abusive language on the picket line and had challenged employees to fight.

The Respondent's evidence concerning Marrero's alleged misconduct is the testimony of Jose Manuel Pagan de Jesus who said that, over a loud speaker on the picket line, Marrero stated that Correa was a "20th century Hitler." Marrero, along with other strikers, asked members of the Cooperative to withdraw their funds. Finally, according to Pagan, Reinaldo Rodriguez reported that Marrero had called him names, said he had a knife, and threatened to punch his stomach if he continued to work for the Cooperative.

Marrero denied the substance of the factual allegations contained in Pagan's testimony. The Respondent did not call Rodriguez to testify concerning the alleged threat.

It is well settled that an employer violates Section 8(a)(3) of the Act in discharging an individual for engaging in a strike. However, if it can be established by the employer that that individual has engaged in egregious misconduct on the picket line, such is a bar to reinstatement. Where the employer is able to establish a good-faith belief that the individual has engaged in picket line misconduct, the burden shifts to the General Counsel to prove that the individual did not engage in the activity alleged or that it was not sufficiently serious to bar reinstatement. *Rubin Brothers Footwear, Inc.*, 99 NLRB 610 (1952).

Basically picket line language, even if directed to a member of management, does not justify discharge of an employee unless "it was so offensive, deflamatory or opprobrious as to remove it from the protection of the Act." *Ben Perkin Corporation*, 181 NLRB 1025 (1970). And in those cases where an employee's language has been found sufficient to justify discharge, the employee had been warned in some way that a continuation would result in discipline. E.g., *Southwestern Bell Telephone Company*, 200 NLRB 667 (1972).

I conclude that a statement, even if uttered, to the effect that the president of the board of directors is a "20th century Hitler" is not so egregious as to deny one the protective mantle of the Act. Many things are said during the course of a strike which, while not to be condoned, nevertheless are not so serious as to deny one his rights as an employee. Apparently words to this effect were on a picket sign, though it is not clear how long such a sign was carried; even so, there is no evidence that employees were told to cease carrying it.

Asking members to withdraw funds from the Respondent was simply asking them to cease doing business with the Employer—a traditional purpose of picketing; and one certainly protected by the Act. Thus I conclude that the Respondent was not justified in discharging Marrero (or Oliveras, Melendez, and Lozada) for this reason.

On the other hand, to threaten to assault one with a knife if he continues to work is a serious act of misconduct. However, I am constrained to conclude that the alleged threat by Marrero did not in fact occur. I find that Marrero's demeanor was positive and that his testimony denying this event is credible. The Respondent brought forth no direct evidence of this alleged threat, relying solely on the hearsay testimony of one of its managers. Such is not sufficient proof to overcome Marrero's credible denial that he in fact made the threat.

I conclude that in discharging Marrero on June 18, as with the other employees, the Respondent violated Section 8(a)(1) and (3) of the Act and that Marrero did not engage in sufficiently serious picket line misconduct to affect his status as an employee. It follows that the Respondent's contention that employees engaged in unprotected activity when seeking to have Marrero reinstated

in July is not meritorious. I thus reject the Respondent's contention that the strike became unprotected in July when employees sought the reinstatement of Marrero.[5]

3. Luz Berrios

Luz Berrios was a receptionist, having started her employment in 1976. While the Respondent admits she was discharged along with the other striking employees, it contends that she is not entitled to reinstatement because, in effect, she embezzled a $1,000 from the account of Guadalupe Otero Vega.

Though the facts relating to this matter are far from clear, on balance I credit the testimony of Berrios and conclude that in fact she was authorized by Otero to make withdrawals from his account of $400 and $600 and that she in fact gave the money to him.

Otero testified that he had given Berrios the authority to make deposits on his behalf because they were neighbors; however, he had never authorized her to make any withdrawals. He further testified that she did not give him the $1,000 she withdraw in January and February, and that he first learned of these withdrawals in July.

While he testified that he remembers these events very clearly, his wife testified that as a result, apparently, of an industrial accident, he is at times forgetful. Indeed, Otero has been under some kind of a temporary workmen's compensation disability.

According to Berrios, when Otero asked her to make the withdrawals, she did so signing both his name and her's (he cannot read or write and can barely sign his name) on the withdrawal slip. The policy of the Respondent is to give cash for less than $500 but where the withdrawal is for more than $500, a check is issued signed by the administrator. Thus, when Berrios withdraw the $600 in February, the fact that she was making the withdrawal on the account of Otero was known to the administrator, even if management had not known about the previous withdrawal of $400.

When Otero claimed in July that his account was short by $1,000, without investigating the matter or interviewing Berrios, the Respondent gave him credit for that amount, but advised him that, should it turn out that Berrios was not guilty of having taking the money without authorization, he would have to pay it back.

Following this event, Berrios, first by herself and then with others including counsel for the Union, visited the Otero residence to inquire concerning this matter. The testimony of the Union's attorney, which I credit, is to the effect that Otero and his wife did admit that he had given authorization to Berrios to withdraw the money and that he had in fact received it.

Many aspects of this matter are very curious. For instance, Berrios contends that Otero sought to repay the $1,000 in October by giving her two workmen's compensation checks of $90 each, one dated February the other April, which her then fiancee deposited it in a joint checking account with her. That Otero gave Berrios the two checks is not contested. Also the Respondent allowed an employee to make withdrawals on a member's account without any evidence of authorization; and then reimbursed the member for an alleged shortage without any investigation. Nevertheless, from the testimony I credit, I believe that in fact Berrios did have authorization to make the withdrawals, did so, and gave the money to Otero. I conclude she was not guilty of such misconduct as to deny her continued employment. Accordingly, the Respondent shall be ordered to reinstate Berrios along with the other discharged striking employees.

C. *The 8(a)(1) Allegations*

The General Counsel contends that in his June 18 letter Correa threatened the striking employees with discharge if they continued to strike. Such is allegedly violative of Section 8(a)(1). It is clear from the contents of the letter that in fact employees were threatened and I thus conclude that the Respondent violated Section 8(a)(1) as alleged.

The General Counsel also contends that the December 20 offer of reinstatement to five of the strikers was violative of Section 8(a)(1) in that reinstatement was conditioned on their abandoning the strike. Having been unlawfully discharged, these employees were entitled to reinstatement. However, the Respondent expressly limited the time when they could take advantage of the offer to January 13, 1981. Correa continued: "We must warn you that if you do not present yourself on or before that day to work we must conclude that you have no interest in returning to work with us."

I therefore conclude that the December 20 offer of reinstatement was conditional and in effect stated that there would be no future employment unless the employees abandoned the strike. Such was a violation of Section 8(a)(1) and did not serve to toll backpay liability as to these five. *The Masonic and Eastern Star Home of the District of Columbia*, 206 NLRB 789 (1973).[6]

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The unfair labor practices found above, occurring in connection with the Respondent's business, have a close, intimate and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof within the meaning of Section 2(6) and (7) of the Act.

V. REMEDY

Having found that Respondent discharged striking employees in violation of Section 8(a)(1) and (3) of the Act, it will be ordered to cease and desist from such activity and to offer reinstatement to the discharged strikers to their former jobs or, if those jobs no longer exist, to substantially equivalent positions of employment and to make them whole for any losses they may have suffered as a result of the discrimination against them in accord-

[5] I do not imply that the Respondent's legal contention is sound—that had Marrero been justifiably discharged, employees would not have had the right to seek his reinstatement.

[6] The General Counsel's motion to withdraw par. 12(a) of the consolidated complaint is granted.

ance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as provided in *Florida Steel Corporation*, 231 NLRB 651 (1977).[7] Backpay commences from the date of their discharges, which I find is, respectively, June 12, 1980, Milagros Santa and Gertrudis Ramos; June 18, 1980, Francisco J. Marrero; June 23, 1980, Juan F. Melendez, Luz S. Berrios, Lydia E. Sierra, Luis S. Oliveras, Gil Colon Maldonado, Juan U. Lozada Rivera, and Maria E. Renia; October 21, 1980, Georgina Gomez.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this matter, and pursuant to the provisions of Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[8]

The Respondent, Cooperativa de Credito y Ahorro Vegabajena, Vega Baja, Puerto Rico, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against employees because they have engaged in a lawful strike or other concerted activity for their mutual aid or protection.

(b) Threatening employees with discharge or other reprisals because they engage in a strike or other concerted activity for their mutual aid or protection.

(c) Conditioning reinstatement to discharged strikers on their abandoning the strike.

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.[9]

2. Take the following affirmative action:

(a) Offer immediate reinstatement to Francisco J. Marrero, Juan F. Melendez, Luz S. Berrios, Lydia E. Sierra, Luis S. Oliveras, Gil Colon Maldonado, Juan U. Lozada Rivera, Maria E. Renia, Milagros Santa, Gertrudis Ramos, and Georgina Gomez to their former jobs or, if those jobs no longer exist, to substantially equivalent positions of employment and make them whole for any losses they may have suffered as a result of the discrimination against them in accordance with the formula set forth in the remedy section above.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Vega Baja, Puerto Rico, facility copies of the attached notice marked "Appendix."[10] Copies of said notice written in English and Spanish, on forms provided by the Regional Director for Region 24, after being duly signed by the Respondent authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 24, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

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[7] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[8] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[9] This matter, particularly including the Respondent's failure to bargain over a period of several months and its denial of recognition of the Union until such time as the contract is signed, along with the discharge of strikers, lead me to believe that broad injunctive relief is necessary to effectuate the policies of the Act. See *Hickmott Foods Inc.*, 242 NLRB 1357 (1979).

[10] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."